No. 87-629

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

AMERICAN NATIONAL BANK & TRUST COMPANY, not individually, but solely as Trustee under Trust Number 33832, and PAXTON LANDFILL CORPORATION, an Illinois corporation,

Petitioners,

vs.

CITY OF CHICAGO, a municipal corporation, and ZONING BOARD OF APPEALS FOR THE CITY OF CHICAGO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether Petitioner's federal action is barred, under the principle of *res judicata*, by the decision of the Illinois Appellate Court concerning the same claim where Illinois law would bar a subsequent state action.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On June 1, 1983, the petitioner, Paxton Landfill Corporation ("Paxton"), filed an application with the Chicago Zoning Board of Appeals ("Board") for a special use variance for an area encompassing two adjacent landfill sites, called Paxton I and Paxton II. During the application pro-

ceedings, the City of Chicago contested the ownership of certain portions of the site. Paxton filed a state court declaratory judgment action on December 6, 1984, to quiet title. The quiet title action was subsequently resolved in Paxton's favor and is not at issue here.

While the quiet title action was pending, the Board, at the request of the state trial court, held a hearing on Paxton's application for the special use zoning variance. At the hearing, objectors from the community appeared, testified and were represented by counsel. The Board denied Paxton's application.

On March 8, 1984, notice of the Board's decision was mailed to Paxton. On March 22, Paxton amended its declaratory judgment complaint, seeking, *inter alia*, administrative review of the Board's decision. On April 10, the City moved to dismiss the administrative review portion of the complaint because Paxton had failed to name and serve the proper agencies and the community objectors, as required by the Illinois Administrative Review Act. Ill. Rev. Stat. 1983, ch. 110, sec. 3-103. In response to that motion, Paxton served summons the next day on the Board, but not on the objectors. Summons was issued to the objectors on April 17, forty days after notice to Paxton of the Board's decision. The trial court denied the City's motion to dismiss.

On July 31, the trial court granted Paxton's motion for summary judgment and remanded the cause to the Board with instructions to "issue the resolution for Variation in the Nature of a Special Use, if otherwise entitled, i.e. conforms to all ordinances."

The City appealed the reversal of the Board's decision to deny the variance. The appellate court reversed the trial court, holding that the trial court erred in failing to

grant the City's motion to dismiss. It found that Paxton failed to act with due diligence in obtaining issuance of summons to the objectors, and therefore failed to comply with the mandatory requirements of the Administrative Review Act. 132 Ill. App. 3d 570, 593 (1985). The Illinois Supreme Court denied leave to appeal, thus making the appellate court's decision final and permanently reinstating the Board's original denial.

Paxton next filed this suit in federal district court under several provisions of the federal and state constitution, requesting, for the first-time, damages for the Board's denial of the variance, and challenging for the first time the constitutionality of the zoning classification of the subject property. The district court granted the City's motion to dismiss the complaint on the ground that Paxton's federal claims are barred by the doctrine of *res judicata*. 636 F. Supp. 374 (N.D. Ill. 1986). The United States Court of Appeals for the Seventh Circuit affirmed, and Paxton now seeks a *writ of certiorari* to review that decision.

ARGUMENT

The decisions of the court of appeals and the district court in this case finding Paxton's federal claims barred by the doctrine of *res judicata* are fully consistent with Illinois and federal claim preclusion law and therefore do not warrant review by this Court. Furthermore, this case does not fit, as Paxton claims, within the narrow exception alluded to by this Court as applying to cases in which the plaintiff was denied a full and fair opportunity to raise its constitutional theories in state court. Paxton could have raised its constitutional challenge in the state court pro-

ceeding, but failed to do so. Moreover, Paxton's dire predictions as to the effect of this case on anyone other than itself are baseless. Paxton's only problem here is its own failure to comply with simple but mandatory state court procedures. This case therefore does not warrant exercise of this Court's supervisory power.

A.

THE COURT OF APPEALS CORRECTLY APPLIED ILLINOIS LAW IN DETERMINING THAT THE DECISION OF THE ILLINOIS APPELLATE COURT WAS A FINAL JUDGMENT ON THE MERITS.

Federal law requires that federal courts give to a state court judgment the same preclusive effect the judgment would be given under the law of the state that rendered it. 28 U.S.C. § 1738; *Migra v. Warren City School District*, 465 U.S. 75 (1984). The only question in this case, therefore, is whether the judgment of the Illinois Appellate Court in Paxton's prior state action bars this federal action. The court of appeals and the district court correctly determined that it does.

The Illinois doctrine of *res judicata* provides:

> a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.

Builders Plumbing Supply Co. v. Zambetta, 143 Ill. App. 3d 188, 191 (1986), *quoting Housing Authority v. YMCA*, 101 Ill. 2d 246, 251 (1984). In its petition Paxton disputes that the judgment of the Illinois Appellate Court was final and on the merits. Paxton's contentions are contrary to Illinois law.

The Illinois Appellate Court held that Paxton's administrative review proceeding should have been dismissed because Paxton failed to have summons issued to all proper parties* within 35 days, as required by the Illinois Administrative Review Act (Ill. Rev. Stat. 1983, ch. 110, §§ 3-103, 3-107). Under Illinois law, the appellate court's decision "operates as an adjudication upon the merits." Ill. Rev. Stat. 1983, ch. 110A, Supreme Court Rule 273. Rule 273 provides:

> Unless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits.

Contrary to Paxton's argument, the Illinois Supreme Court has determined that the requirement that summons issue in an administrative review proceeding within 35 days is mandatory and not jurisdictional. *City National Bank and Trust Co. v. Property Tax Appeal Board*, 92 Ill. 2d 378, 382 (1983); *Cox v. Board of Police & Fire Commissioners*, 96 Ill. 2d 402, 403-04 (1983). Failure to comply with the rule is not an absolute bar to bringing suit; rather, a plaintiff must show diligence in attempting to comply with the requirement, or the administrative review action may properly be dismissed. *See City National Bank*, 97 Ill. 2d at 382; *Cox*, 96 Ill. 2d at 404; *see also, Moretti v. Dept. of Labor*, 119 Ill. App. 3d 740 (1983).

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* Paxton refers to the objectors as witnesses (Petition at 6), however, under the Illinois Administrative Review Act "all persons, other than the plaintiff, who were parties of record . . . shall be made defendants." Ill. Rev. Stat. 1985, ch. 110, sec. 3-107. The objectors were parties of record at the Board hearing, and therefore should have been made defendants.

In Paxton's state proceeding, the Illinois Appellate Court followed precisely the holdings of *Cox* and *City National Bank* that the 35-day requirement was mandatory and found that "the bank failed to act with diligence to procure issuance of the summonses." 132 Ill. App. 3d at 572. Under *Cox* and *City National Bank*, dismissal on that ground was not jurisdictional. The appellate court's reference to jurisdiction (132 Ill. App. 3d at 573), relied upon by Paxton in its petition, was properly characterized by the district court as "simply careless usage." 636 F. Supp. at 381. Thus, under Illinois Supreme Court Rule 273, the state judgment operates as an adjudication on the merits and bars subsequent litigation of the same claim.

Paxton erroneously relies on *Fredman Brothers Furniture Co. v. Department of Revenue*, 109 Ill. 2d 202 (1985), to support its contention that the dismissal was jurisdictional. *Fredman* involved the Illinois Administrative Review Act requirement that a complaint be filed within 35 days; it does not discuss the 35-day service requirement. Under Illinois law, filing and service are two separate and distinct requirements. While timely filing of a complaint is jurisdictional "and a one-day delay in filing will bar relief," *Board of Education v. Adelman*, 137 Ill. App. 3d 965, 970 (1985), timely issuance of summons is mandatory, and plaintiff must show due diligence. *Cox*, 96 Ill. 2d 402; *City National Bank*, 92 Ill. 2d 378; *Moretti*, 119 Ill. App. 3d 740. Thus, *Fredman* is not relevant.

Paxton's reliance on *O'Hare International Bank v. Zoning Board of Appeals*, 37 Ill. App. 3d 1037 (1976), is also totally misplaced. As the Court of Appeals correctly observed, the *O'Hare* case discusses neither principles of claim preclusion nor the proper interpretation of section 3-103 of the Administrative Review Act (Slip op. at 18).

O'Hare held only that under the Illinois statute which specifically allows refiling of an action within one year of the reversal of a favorable judgment, the plaintiff could refile its action. *See* Ill. Rev. Stat. 1975, ch. 83, par. 24a. Paxton never attempted to refile its case pursuant to that statute. *O'Hare* therefore has no application here.

Thus, the district court was correct in finding that under Illinois law the 35-day requirement for issuance of summons is mandatory and not jurisdictional, and the court of appeals correctly agreed. The Illinois Appellate Court's decision in this matter was final and on the merits, and thus operates as a bar to the instant action.

B.

NO EXCEPTION TO APPLICATION OF THE PRINCIPLE OF *RES JUDICATA* IS WARRANTED HERE BECAUSE PAXTON HAD A FULL AND FAIR OPPORTUNITY TO LITIGATE ALL OF ITS CLAIMS IN STATE COURT, BUT FAILED TO PROPERLY DO SO.

Paxton argued that this Court should apply a narrow exception to the application of 28 U.S.C. § 1738 and the principles of *res judicata* because, it argues, Illinois did not provide it a full and fair opportunity to litigate its constitutional claims. While this Court has alluded to the possibility that such an exception might apply in some section 1983 actions, this case warrants no such treatment. Illinois clearly provided Paxton the opportunity to litigate all of its claims. Paxton, however, failed to avail itself of that opportunity. Paxton never attempted to raise its constitutional claims in state court. Further, Paxton's federal complaint did not challenge on due process grounds the state court procedures it now claims are unfair.

There is no question that Illinois law allows constitutional issues to be raised in an administrative review proceeding. *Howard v. Lawton*, 22 Ill. 2d 331 (1961). Furthermore, state courts have concurrent jurisdiction over section 1983 claims. *See Ossler v. Village of Norridge*, 557 F. Supp. 219, 222 n.2 (N.D. Ill. 1983). The fact that despite the opportunity to do so Paxton failed to raise its constitutional claims in state court and to follow state court procedures does not remove the *res judicata* bar to this suit. It was only because of Paxton's own lack of diligence that it did not make full use of the available state court procedures, and that failure is not actionable. *See Kremer v. Chemical Construction Co.*, 456 U.S. 461, 485 (1982).

Paxton also argues that the administrative review procedures create an unfair 35-day statute of limitations for section 1983 claims, and cites numerous cases rejecting short statutes of limitations as appropriate borrowing statutes for section 1983. In so doing, Paxton attempts to mislead this Court entirely as to the effect of the decisions below. The question in this case is not which state statute to borrow as the statute of limitations for initiating section 1983 actions. That question was settled by this Court in *Wilson v. Garcia*, 471 U.S. 261 (1985), and pursuant to *Wilson*, the statute of limitations in Illinois for section 1983 actions is two years. *See Anton v. Lephamer*, 787 F.2d 1141 (7th Cir. 1986). The question in this case is whether Paxton's federal action is barred by the doctrine of *res judicata* where its state court action was dismissed after Paxton's own failure to follow mandatory service requirements. Paxton has failed to cite a single case addressing this question. The cases relied on by Paxton concerning the time limit for the initiation of a section 1983 action are all inapposite.

A claim barred by the running of the statute of limitations is *res judicata* not only as to the time-barred claim, but also as to all other claims which could have been raised in the initial suit. *See Nilsen v. City of Moss Point*, 701 F.2d 556, 562 (5th Cir. 1983); *Cannon v. Loyola University of Chicago*, 609 F. Supp. 1010, 1016 (N.D. Ill. 1985). Paxton had a full and fair opportunity to raise all of its constitutional claims in the state court proceeding, just as its count in administrative review was appended to its original quiet title action. Further, the constitutional claims need not have been filed within 35 days, but could have been filed at any time up to the two-year statute of limitations providing Paxton had a live pending action. Because Paxton had the opportunity, but chose not to raise its constitutional claims in its prior state court action, Paxton is now barred from relitigating its claim under a new theory in federal court. Paxton's problem, as the court of appeals noted, was that it failed to appreciate the requirements of the state statute, even after the City alerted it to the problem by the motion to dismiss filed with two days left to run on the 35-day service requirement (Slip op. at 6). Paxton's lack of diligence does not provide it with a new federal cause of action.

CONCLUSION

Because the decision of the Court of Appeals finding Paxton's action barred by *res judicata* is consistent with Illinois and federal claim preclusion law, and because this

case does not warrant exceptional treatment, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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